No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* UNITED NEGRO COLLEGE FUND AND NATIONAL URBAN LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

United Negro College Fund

Amicus United Negro College Fund ("UNCF") was founded in 1944 to increase educational opportunities for blacks. It is currently the Nation's largest and most successful African American education organization and its steadfast commitment to higher education cannot be overstated. UNCF is most often associated with the slogan for its public awareness campaigns – "A Mind Is A Terrible Thing To Waste®" – which serves as a stark reminder of the consequences of failing to meet the educational needs of a significant portion of the population.

UNCF's founding purpose was to raise general operating funds for its member colleges and universities to lower tuition costs.[2] UNCF has been enormously successful in this regard. Since its founding, UNCF has raised nearly $4.5 billion to support its member colleges and universities, and tuition and fees at UNCF members are at least 26% lower than comparable institutions. Over time, UNCF has expanded its mission to more than

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1. The parties have filed letters, pursuant to Supreme Court Rule 37.3(a), consenting to the blanket filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no person or entity, other than UNCF or the National Urban League, their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

2. To become a member of UNCF, an institution must be a historically black, private, accredited, four-year college or university in the United States, founded prior to 1945, and operated solely for educational or scientific purposes. There are currently thirty-seven UNCF members in eleven southern states, including Texas, and Ohio.

400 programs at a variety of public and private colleges and universities throughout the United States, offering scholarship programs, mentoring, summer enrichment, curriculum and faculty development, and leadership development. To date, UNCF has helped more than 400,000 students earn undergraduate and graduate degrees.

In 1999, UNCF was honored to become the administrator of the Gates Millennium Scholars Program, which was founded by Bill and Melinda Gates. The program's twenty-year goal is to provide 20,000 African American, Hispanic, Native American and Asian American students, who show academic promise, significant unmet financial needs and demonstrated leadership skills, with the opportunity to attend undergraduate, graduate and professional schools.[3] Between the 2000 and 2014 academic years, the Gates Millennium Scholars Program funded more than 17,000 scholars and awarded more than $800 million toward higher education costs.[4]

In recent years, UNCF has implemented many exciting new initiatives and programs. By way of example, the UNCF/Koch Scholars Program is an educational initiative that explores how entrepreneurship,

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3. Press Release, Bill & Melinda Gates Foundation, Gates Millennium Scholars Program to Announce Inaugural Class of Gates Millennium Scholars (June 8, 2000), http://www.gatesfoundation.org/media-center/press-releases/2000/06/inaugural-class-of-gates-millennium-scholars.

4. The Gates Millennium Scholars, About GMS: The Gates Millennium Scholars Program, http://www.gmsp.org/publicweb/aboutus.aspx (last visited Oct. 29, 2015).

economics and innovation contribute to the well-being of individuals, communities and society. The program offers scholarship opportunities to exemplary students and combines academic support, mentoring and networking opportunities to yield a comprehensive student learning experience for the next generation of entrepreneurs and community leaders. Similarly, the UNCF Career Pathways Initiative was designed to meaningfully assist affiliated institutions in aligning their curricula with local and national workforce needs and strengthening career service operations to increase the number of undergraduates who immediately transition to meaningful jobs in their chosen fields upon graduation. These are just a few examples of the many ways in which UNCF is paving the way for bright young minority students.

Throughout its history, UNCF has enjoyed widespread support by Americans of all races and backgrounds. Significantly, it has been honored by a tradition of support from Presidents of the United States, including President Franklin D. Roosevelt, who supported the first annual fundraising campaign;[5] President John F. Kennedy, who donated his Pulitzer Prize funds awarded for his book, *Profiles in Courage*, to UNCF;[6] Presidents Bill Clinton and George W. Bush, who helped raise $3.8 million to support the rebuilding efforts of several UNCF-member colleges and universities along the Gulf Coast that were

5. 2 ABC-CLIO, PHILANTHROPY IN AMERICA: A COMPREHENSIVE HISTORICAL ENCYCLOPEDIA 480 (Dwight F. Burlingame ed., 2004).

6. *Id.*

destroyed by Hurricane Katrina;[7] and President Barack Obama, who donated to UNCF part of the $1.4 million he received in conjunction with his 2009 Nobel Peace Prize.[8]

UNCF has always played a critical role in advocating nationally for the importance of education and college readiness. In particular, UNCF has sought to remain active before this Court when significant issues relating to education have arisen. UNCF filed an *amicus curiae* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), urging this Court to sustain the constitutionality of the University of Michigan Law School's consideration of race in making admissions decisions. UNCF also joined an *amicus curiae* brief in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), encouraging this Court to sustain the constitutionality of two local school boards' efforts to integrate their public schools. Most recently, UNCF filed an *amicus curiae* brief in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) ("*Fisher I*"), in which this Court first confronted the question of whether the race conscious admissions process at University of Texas ("UT") passes constitutional muster.

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7. *Former Presidents Bush and Clinton Honored at UNCF's 63rd Anniversary Dinner for Their Philanthropic Work*, PR Newswire (Mar. 10, 2007), http://www.prnewswire.com/news-releases/former-presidents-bush-and-clinton-honored-at-uncfs-63rd-anniversary-dinner-for-their-philanthropic-work-51665102.html.

8. Brian Montopoli, *Obama Donates Nobel Prize Money to 10 Charities*, CBS News, Mar. 11, 2010, http://www.cbsnews.com/8301-503544_162-20000311-503544.html.

National Urban League

Amicus National Urban League is a historic civil rights and urban advocacy organization dedicated to economic empowerment in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National Urban League improves the lives of more than two million people annually through direct service programs, including education, employment training and placement, housing and health, which are implemented locally by more than 90 National Urban League affiliates in 300 communities across 36 states and the District of Columbia. Recognizing that education is the key pipeline opportunity to full economic participation by its disadvantaged constituents, the organization has established the goal that by 2025 "every American is ready for college, work and life." Accessing a postsecondary education and ensuring college completion are at the core of the National Urban League's mission.

Given the historical mission of UNCF and the National Urban League, both organizations continue to have a strong interest in the proper resolution of the questions first presented in *Fisher I* and now again addressed by this Court.

SUMMARY OF ARGUMENT

As this Court has consistently recognized, education plays a unique role in the future of our great Nation. In *Brown v. Board of Education*, the Court noted that education "is the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In *Plyler v. Doe*, 457 U.S. 202 (1982), this Court referred to "the

pivotal role of education in sustaining our political and cultural heritage." *Id.* Most recently, in *Grutter*, this Court applied these principles to higher education, writing: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. In upholding UT's admission process, the U.S. Court of Appeals for the Fifth Circuit similarly recognized that "university education is more the shaping of lives than the filling of heads with facts." *Fisher v. University of Texas at Austin*, 758 F.3d 633, 660 (5th Cir. 2014) ("*Fisher II*").

The Court's statements acknowledging the critical role of education in democracy, which is grounded in voting and community involvement, are supported by objective facts. In the 2012 presidential election, individuals with at least some college education made up 76% of all voters and individuals identifying as college graduates made up 47% of all voters.[9] Individuals with no high school education and individuals with a high school diploma made up only 24% of all voters.[10] College graduates are also more likely to volunteer in their communities than high school graduates. In 2014, among people 25 years and over, 39.4% of college graduates volunteered, compared to only 16.4% of high school graduates.[11]

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9. *President: Full Results*, CNN, http://www.cnn.com/election/2012/results/race/president/#exit-polls (last visited Oct. 29, 2015).

10. *Id.*

11. Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Volunteering in the United States – 2014 (Feb. 25, 2015), http://www.bls.gov/news.release/pdf/volun.pdf.

It is also well established that educational attainment is a key driver of personal income. Median weekly earnings of bachelor's degree recipients working full-time in 2014 were $1,101, $433 more than median weekly earnings of high school graduates.[12] Over a lifetime, a typical college graduate earns $1 million more than the typical high school graduate.[13] Moreover, top-ranked public universities like UT are uniquely situated to play a role in increasing educational opportunities. In 2013, of the roughly ten million undergraduates enrolled in four year degree programs, 63.9% were enrolled at a public four year university.[14] The Court's decision in this matter could potentially affect the ability of minority students to participate fully in our nation's political and economic life.

It is against this background of national importance that this Court must consider any attempts to roll back the progress of minorities and the progress of our Country under the guise of "equal" treatment. While African Americans have seized educational opportunity and grown the ranks of black college graduates, the promise of equity and opportunity in education and society at large remain unfulfilled. And for the betterment of our Nation, race-conscious admissions in higher education remain necessary to further the compelling state interest

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12. Bureau of Labor Statistics, U.S. Dep't of Labor, Earnings and unemployment rates by educational attainment (Apr. 2, 2015), http://www.bls.gov/emp/ep_table_001.htm.

13. U.S. Dep't of Education, College Scoreboard, https://collegescorecard.ed.gov/.

14. U.S. Dep't of Educ., Institute of Educ, Sci., Nat'l Ctr. for Educ. Statistics, Table 311.15, https://nces.ed.gov/programs/digest/d14/tables/dt14_311.15.asp.

of student body diversity. Indeed, affirmative action policies such as those adopted by universities that are consistent with *Grutter* have been crucial to reducing gaps in educational attainment over the past 50 years. If the problem is ever to be remedied, universities must be given the flexibility to adequately address this ongoing problem of national concern.

The *Fisher I* Court clarified that "[r]ace may not be considered unless the admissions process can withstand strict scrutiny" and remanded to the Fifth Circuit to conduct a more exacting analysis. *Fisher I*, 133 S. Ct. at 2418. UT has undoubtedly met the admittedly difficult burden of proving that its admissions program is narrowly tailored to obtain the educational benefits of diversity, a long recognized compelling government interest. The record clearly demonstrates that UT implemented every workable race-neutral effort at its disposable, and only then adopted a race-conscious admissions plan, focusing on the diversity of individual applicants rather than quotas or targets and complementing an automatic admissions system that is color blind. We urge this Court to affirm the decision of the Fifth Circuit, which correctly reasoned that: "an examination that looks exclusively at the percentage of minority students fails before it begins. . . . an emphasis on numbers in a mechanical admissions process is the most pernicious of discriminatory acts because it looks to race alone, treating minority students as fungible commodities that represent a single minority viewpoint." *Fisher II*, 758 F.3d at 656.

ARGUMENT

IT IS NOT IN THE NATION'S INTEREST TO EXPLICITLY OR IMPLICITLY END RACE-CONSCIOUS ADMISSIONS IN HIGHER EDUCATION

A. THE EFFECTS OF STATE-SPONSORED DISCRIMINATION ARE NOT MERE HISTORICAL FOOTNOTES

It is impossible to evaluate colleges' and universities' compelling interest in student body diversity without recognizing the primary reasons that diversity does not occur naturally. There has been a long history of state-sponsored and private segregation and discrimination in the United States against African Americans, Native Americans, Hispanics and Asian Americans in almost every area of society. Not only has this segregation and discrimination resulted in limited educational and employment opportunities for these groups, but it has also manifested itself in racially biased police and judicial practices that have underpinned a modern civil rights movement.

As detailed in UNCF's *Fisher I amicus curiae* brief, for the first one hundred years of this Nation's existence, the vast majority of African Americans were barred, by law, from educational institutions throughout the United States. It was not until the 1870s that a true public primary school system and, to a lesser extent, a secondary school system for African Americans began to develop in the South. Those systems were almost entirely segregated

and remained so for nearly a century.[15] Finally, in 1954, the *Brown* Court declared that segregated schools were inherently unequal. Unfortunately, transforming that decree into reality has proved difficult at all levels. *See, e.g., United States v. Fordice*, 505 U.S. 717, 729, 732-33 (1992) (holding that a State must take affirmative steps to eradicate prior de jure segregation, and "that the adoption and implementation of race-neutral policies alone [do not] suffice to demonstrate that the State has completely abandoned its prior dual system").

1. Lingering Effects of Discrimination: Limited Educational Opportunities

Notwithstanding the laudable progress since *Brown*, large numbers of minority school children, especially black youth in large urban and smaller rural school settings, remain plagued by segregated learning environments and disproportionately vulnerable to the legacies of racial bias and poverty that produce underachievement.[16]

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15. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 365-368 (1988); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 445-55 (8th Ed. 2000).

16. *See* MONIQUE W. MORRIS, BLACK STATS: AFRICAN AMERICANS BY THE NUMBERS IN THE TWENTY-FIRST CENTURY 7 (The New Press, 2014); *see also* LAURA LIPPMAN, SHELLEY BURNS & EDITH MCARTHUR, NAT'L CTR. FOR EDUC. STATISTICS, URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY v-xii, 75-80 (1996), http://nces.ed.gov/pubs/96184all.pdf.

Forty-six percent of black students in the United States attend a predominantly black school,[17] while 39% are educated in "intensely segregated" schools.[18] Nationwide, minority students are disproportionately educated in schools defined as high poverty, meaning that over 75% of attending students qualify for free and reduced-price lunches through the National School Lunch Program.[19] Forty-two percent of black children, 38% of Latino children, and 31% of Native American children are educated in all high-poverty schools (both elementary and secondary).[20] By comparison, only 6% of white children are educated in high-poverty schools.[21]

Moreover, significant achievement gaps between minority and white students persist, ranging between 15

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17. Terris Ross, Grace Kena, Amy Rathburn, et al., *Higher Education: Gaps in Access and Persistence Study,* NCES 2012-046 (Washington, D.C.: National Center for Education Statistics, 2012), https://nces.ed.gov/pubs2012/2012046.pdf.

18. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* (Los Angeles, CA: Civil Rights Project/Proyecto Derechos Civiles at UCLA, 2009), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf.

"Intensely segregated" schools are defined as schools in which 90-100% of the total student population is comprised of students of color.

19. Morris, *supra* note 16, at 11.

20. Ross et. al, *supra* note 17.

21. *Id.* at 2.

and 30 percentage points.[22] At the current rate of progress, the gap still could easily take decades to close.[23]

These trends carry over to the domain of higher education. In 2012, blacks earned 10% of bachelor's degrees, while whites earned 73% of these degrees.[24] Similarly, blacks composed 7% of Americans with a professional degree, while whites composed 74% of Americans with a professional degree.[25]

2. Lingering Effects of Discrimination: Limited Employment Opportunities

Equal access to opportunity remains a largely unrealized aspiration for many minorities, as illustrated by underrepresentation in key employment sectors.

At all levels of government, the proportion of minority elected officials trails far behind minorities' share of the

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22. NANCY KOBER, NAOMI CHUDOWSKY & VICTOR CHUDWOSKY, CTR. ON EDUC. POLICY, STATE TEST SCORE TRENDS THROUGH 2008-2009, PART 2: SLOW AND UNEVEN PROGRESS IN NARROWING GAPS 4 (2010), http://www.cep-dc.org/displayDocument.cfm?DocumentID=334.

The term "achievement gap" refers to the disparity in academic performance as measured by standardized test scores, grades, high school graduation rates and post-secondary enrollment and completion rates.

23. *Id.*

24. National Center for Education Statistics, "Fast Facts: Degrees Conferred by Sex and Race," Institute of Education Sciences, U.S. Department of education, 2012, http://nces.ed.gov/fastfacts/display.asp?id=72.

25. *Id.*

electorate. In Congress, roughly 80% of lawmakers are white.[26] There have been a total of only nine black U.S. senators[27] and four black governors.[28] 2013 marked the first year that there were two black U.S. senators serving concurrently.[29]

Racial and ethnic representation disparities also exist in U.S. military leadership. Despite the widespread recognition that diverse military leadership is critical to U.S. national security,[30] only 15.3%[31] of all officers were black or Latino in 2013, despite making up 31.0%[32] of all enlisted forces. As of 2014, only 10 black men ever gained four-star rank in the U.S. armed forces.[33]

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26. Jennifer Manning, *Membership of the 114th Congress: A Profile* (Congressional Research Service, 2015) *available at* https://www.fas.org/sgp/crs/misc/R43869.pdf.

27. U.S. Senate, "Breaking New Ground – African American Senators," http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm (last visited Oct. 29, 2015).

28. MORRIS, *supra* note 16, at 117.

29. Breaking New Ground, *supra* note 27.

30. *See* Brief for Lt. Gen. Julius W. Becton, Jr., *et al.* as *Amici Curiae* Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

31. Dr. Elizabeth Culhane, Annual Demographic Profile of the Department of Defense and United States Coast Guard Fiscal Year 2013; http://www.deomi.org/downloadableFiles/DOD_USCG_Deomographics_FY_2013_Final_201406021.pdf (last visited Oct. 29, 2015).

32. *Id.*

33. *Id.*

This dearth of diversity also exists in the private sector. Of the 5,463 *Fortune 500* corporate board seats available in 2011, minorities only held approximately 10% of such seats, with blacks holding only 4.6%.[34] Further, minorities were virtually locked out of board leadership roles, as whites held 97% of board chair positions.[35] This underrepresentation exists not just at the highest executive levels – of the 77% of blacks employed in the private sector in 2012, only 3% of executives, senior-level officials, and managers were black.[36]

Minorities are also noticeably absent from traditional white-collar jobs. In 2010, 9.2% of all physicians were African American, Latino, Native American or Alaska Native.[37] Approximately 12% of all attorneys are racial or ethnic minorities.[38]

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34. Alliance for Bd. Diversity Census, Missing Pieces: Women and Minorities on *Fortune* 500 Boards 9 app. 2 (2011), http://theabd.org/Missing_Pieces_Women_and_Minorities_on_Fortune_500_Boards.pdf.

35. *Id.* at 10 app 3.

36. Morris, *supra* note 16, at 100.

37. AMA, Physician Characteristics and Distribution in the US (2012).

38. ABA, Lawyer Demographics, *available at* http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf (last visited Oct. 29, 2015).

3. Lingering Effects of Discrimination: Racially Biased Police and Judicial Practices

In perhaps no other area are the lingering effects of racial bias and discrimination more pronounced than in the criminal justice system. The penal system in the United States has had a profound impact on the lives of millions of African Americans since the nineteenth century, when blacks were first steered toward the criminal justice system at increasing rates by racially biased police and judicial practices.[39] Today, the contentious relationship between many black communities and law enforcement continues.[40]

The disparate treatment of minorities in the criminal justice system begins at the very first stage of that system: the investigation of suspected criminal activity by law enforcement.[41] Racial bias is most acute at the point of entry to the criminal justice system, given the discretion that police officers have to discriminate in policing practices on the basis of race.[42] Black communities in the United States have long been subjected to increased

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39. MORRIS, *supra* note 16, at 58.

40. *Id.*

41. *See* The Leadership Conference, Justice On Trial: Racial Disparities in the American Criminal Justice System, *available at* http://www.civilrights.org/publications/justice-on-trial/ (last visited Oct. 29, 2015).

42. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 123 (The New Press, 2010).

surveillance and patrolling.[43] Although blacks make up only 13.2% of the general population in the United States,[44] they account for nearly 28% of the total arrests nationwide.[45] Moreover, black motorists are nearly twice as likely to be arrested and nearly three times as likely as white motorists to experience force during interactions with law enforcement.[46]

This overrepresentation also carries over to incarceration. Black males are imprisoned at more than nine times the rate of white males.[47] Indeed, blacks account for 35.4% of all inmates in local jails nationwide[48] and 38.9% of all prisoners under the jurisdiction of the Federal Bureau of Prisons.[49]

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43. MORRIS, *supra* note 16, at 63.

44. United States Census Bureau, "State and County Quick Facts," http://quickfacts.census.gov/qfd/states/00000.html (last visited Oct. 29, 2015).

45. *See* Federal Bureau of Investigation, "Persons Arrested," *Crime in the United States 2014*, *available at* https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2014/crime-in-the-u.s.-2014/tables/table-43 (last visited Oct. 29, 2015).

46. MORRIS, *supra* note 16, at 63.

47. *Id.* at 159.

48. U.S. Department of Justice, Bureau of Justice Statistics, "Jail Inmates at Midyear 2014," http://www.bjs.gov/content/pub/pdf/jim14.pdf (last visited Oct. 29, 2015).

49. Federal Bureau of Prisons, "State of the Bureau 2010," http://www.bop.gov/resources/pdfs/sob10.pdf.

4. Lingering Effects of Discrimination: Police Brutality and Extrajudicial Killings

This disparate treatment of minorities by law enforcement extends beyond racially based traffic stops and profiling.[50] Minority citizens are also the prime victims of violence both at the hands of police and private actors.

In a 2011 study, 67% of blacks surveyed reported that there is police brutality practiced in the area where they live, compared with 25% of whites in that same study.[51] Allegations of excessive force by law enforcement continue to generate headlines. Indeed, for decades now, almost every major urban uprising or "race riot" in the United States has begun with an interaction, often fatal, between a black man and the police.[52] On Staten Island, New York, in July 2014, the death of Eric Garner because of the apparent use of a "chokehold" by an officer sparked public outrage.[53] One month later in the St. Louis suburb of Ferguson, Missouri, the fatal shooting by an officer of Michael Brown, an unarmed teenager, ignited

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50. *See* Justice On Trial, *supra* note 41.

51. "Respondents' Perceptions of Police Brutality in Their Area," *Sourcebook of Criminal Justice Statistics*, 2005, www.albany.edu/sourcebook/pdf/t200022005.pdf.

52. United States Department of Justice, Civil Rights Division, The Ferguson Report vii (Introduction by Theodore M. Shaw) (The New Press, 2015).

53. John Wihbey and Leighton Walter Kille, *Excessive or reasonable force by police? Research on law enforcement and racial conflict*, Journalist's Resource, July 1, 2015, http://journalistsresource.org/studies/government/criminal-justice/police-reasonable-force-brutality-race-research-review-statistics.

nationwide protests; a grand jury's decision not to indict the officer triggered further unrest.[54] In November 2014, twelve-year-old Tamir Rice was shot by a police officer in Cleveland, Ohio, while playing with a toy pistol.[55] Since last year alone, the deaths of three African Americans at the hands of law enforcement officers have occurred after drivers were pulled over for minor traffic infractions, including: a broken brake light,[56] a missing front license plate, and failure to signal a lane change.[57]

On March 4, 2015, the United States Department of Justice, Civil Rights Division, issued a damning 102-page report on policing practices in Ferguson. The report illuminated a municipality that is dependent on "police and municipal court practices that exacerbate existing racial bias, including racial stereotypes".[58] Statistical analysis from the Ferguson police department showed, *inter alia*, that blacks are more likely to be searched but less likely to have contraband found on them; more likely to receive a citation following a stop and more likely to receive multiple citations at once; more likely to be arrested; and more

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54. *Id.*

55. *Id.*

56. On April 4, 2015, Walter L. Scott was shot by a police officer after a routine traffic stop in North Charleston, South Carolina. *See* Alan Binder and Manny Fernandez, *North Charleston Set for Weekend of Mourning and Protest*, N.Y. Times, Apr. 11, 2015, at A12.

57. Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risk of Driving While Black*, N.Y. Times, Oct. 25, 2015, at A1.

58. UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, *supra* note 52, at 2.

likely to have force used against them.[59] The Department calculated that the statistical probability that any of these disparities would occur by chance is less than one time in 1000.[60] The report concluded that "[t]hese disparities are unexplainable on grounds other than race".[61]

Race-motivated misconduct is also prevalent at the hands of private actors. In 2013, the FBI identified "3,563 victims of racially motivated hate crime[s]."[62] In Florida in 2013, George Zimmerman was found not guilty for the murder of 17-year-old Trayvon Martin, an unarmed black boy.[63] These cases and others continue to fuel a debate about gun control, Stand Your Ground laws, and the killing of African Americans deemed "justifiable by law."[64] Between 2005 and 2010, white-on-black homicides were most likely among all homicides in Stand Your Ground states to be ruled justified (11.4%), while black-on-white homicides were least likely (1.2%) to be ruled justified.[65] As in the case of Trayvon Martin, when there is a firearm involved, a single victim, a single shooter, and both victim and shooter are male and strangers, racial disparities

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59. *Id.* at 111.

60. *Id.*

61. *Id.*

62. Federal Bureau of Investigation, *Uniform Crime Reports – 2013 Hate Crime Statistics*, https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/topic-pages/victims/victims_final.

63. MORRIS, *supra* note 16, at 81.

64. *Id.*

65. *Id.* at 81-82.

are even more pronounced.[66] White-on-black homicides have justifiable findings 33% more often than black-on-white homicides.[67] White-on-black homicides are 281% more likely than white-on-white homicides to be found justifiable.[68]

5. Lingering Effects of Discrimination: Violence Against Black Churches

In addition to violence aimed at individuals, African Americans have long borne a history of violence that has been directed at them *en masse*, and targeted towards their places of worship.

Black churches suffered at the hands of such targeted hate crimes throughout the Civil Rights Era.[69] Such attacks, however, are not just a matter of remote history. In the 1990s, a wave of firebombings hit black churches.[70] Congressional hearings were held in 1996 at the end of a two-year period when such arson spiked across the

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66. *Id.* at 82.

67. *Id.*

68. John Roman, *Race, Justifiable Homicide, and Stand Your laws: Analysis of FBI Supplementary Homicide Report Data*, URBAN INSTITUTE, at 9 (July 2013), http://www.urban.org/research/publication/race-justifiable-homicide-and-stand-your-ground-laws/view/full_report.

69. Conor Friedersdorf, *Thugs and Terrorists Have Plagued Black Churches for Generations*, THE ATLANTIC (June 18, 2015), http://www.theatlantic.com/politics/archive/2015/06/thugs-and-terrorists-have-plagued-black-churches-for-generations/396212/.

70. *Id.*

Southeast.[71] Twenty-three burnings of black churches were cited at the May 1996 hearing to have taken place 17 months prior to the hearing.[72] One member of Congress likened these burnings to "the return of a biblical plague."[73]

Recently, on the evening of June 17, 2015, a mass shooting took place at Emanuel African Methodist Episcopal Church in downtown Charleston, South Carolina.[74] The police arrested a suspect, Dylann Roof, a white 21-year-old, who later confessed that he committed the shooting in hopes of igniting a race war.[75] Roof killed nine church patrons, all black, by multiple gunshots fired at close range.[76] In the wake of the Charleston shooting, it has been reported that a string of black churches have

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71. *Id.*

72. *Church Fires In the Southeast, Hearing Before the Committee on the Judiciary, House of Representatives*, 104th Congress, (1996), (Statement of Hon. Sheila Jackson Lee, a Representative in Congress from the State of Texas), at 18, http://www.justice.gov/sites/default/files/jmd/legacy/2014/06/03/hear-98-1996.pdf.

73. *Id.* at 16 (Statement of Hon. Earl F. Hilliard, a Representative in Congress from the State of Alabama).

74. *Charleston Church Shooting*, https://en.wikipedia.org/wiki/Charleston_church_shooting#Victims (last visited Oct. 29, 2015).

75. *Id.*

76. *Id.*

been destroyed by fire.[77] Many of these fires are being investigated as arson.[78]

The recent string of violence against African Americans has mobilized into a modern-day civil rights movement, highlighting the continuing effects of segregation, racial discrimination, and unequal opportunity in every aspect of minorities' lives in America. It is against this continuing backdrop of discrimination and its tangible lingering effects – which cannot relegate to a mere footnote in our history – that race-conscious decision making in higher education must be reviewed.

B. THE RAMIFICATIONS OF EXPLICITLY OR IMPLICITLY ELIMINATING RACE-CONSCIOUS DECISION MAKING IN HIGHER EDUCATION ARE SIGNIFICANT

1. Eliminating Race-Conscious Decision Making Will Decrease Student Body Diversity and the Quality of the Educational Experience for All

Studies indicate that state prohibitions on race-conscious admissions preferences would widen the minority educational attainment gap in higher education, resulting in statistically significant decreases in minority

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77. Taryn Finley, *The Charleston Shooting Was At Least The 91st Violent Attack on A Black Church Since 1956*, HUFF POST BLACKVOICES (June 23, 2015), http://www.huffingtonpost.com/2015/07/01/black-church-attacks_n_7618022.html.

78. *Id.*

representation across certain undergraduate, professional and graduate degree programs.[79]

Where the use of race is flatly prohibited in admissions, underrepresented minorities are less likely to obtain undergraduate degrees, and those who do are less likely to obtain them from selective institutions. Three recent studies, each of which examined the implementation of affirmative bans on undergraduate programs in California, Florida, Texas and Washington have documented this displacement effect. One study suggests that banning affirmative action at a selective public institution would decrease African American enrollment from 5.79% to 4.05% (a 30% decline), decrease Hispanic enrollment from 7.38% to 5.35% (a 27.5% decline) and decrease Native American enrollment from .51% to .04% (a 92% decline).[80] A second recent study noted that, due in large part to this displacement, fewer minority students graduate from selective institutions.[81] A third study likewise found that the affirmative action bans decreased African American enrollment from 5.6% to 4.0% (a 29% decline) and Hispanic enrollment from 14.2% to 11.3% (a 20% decline) at the

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79. Currently eight states – Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma and Washington – prohibit the use of affirmative action in admissions.

80. Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. ECON. & STAT., 712, 717 (2012). The study defined a "selective public institution" as a public institution in the top 50 of the 1995 U.S. News & World Report rankings.

81. Peter Hinrichs, *Affirmative Action Bans and College Graduation Rates*, 42 ECON. EDUC. REV. 43, 51 (2014).

most selective universities.[82] The third study further noted that it was unlikely that private institutions, community colleges, less selective public institutions, and institutions in nearby states fully absorbed minority students displaced from selective public institutions.[83]

Affirmative action bans similarly affect minority enrollment in graduate and professional programs. One study found that the bans in California, Florida, Texas and Washington reduced overall minority enrollment in graduate programs at public institutions from 9.9% to 8.7% (a 12.2% decline).[84] Science, technology, engineering, and mathematics (STEM) graduate programs are among the hardest hit, with decreases in the proportion of underrepresented minority students in engineering, natural sciences and social sciences graduate programs of 26%, 19% and 15.7%, respectively.[85] Studies have

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82. Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. HUM. RESOURCES, 435, 447 (2012). The study defined the "most selective institutions" as those institutions whose mean SAT scores are in the top decile.

83. *Id.* at 436-37, 451.

84. Liliana M. Garces, *Racial Diversity, Legitimacy and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 REV. HIGHER EDUC. 99, 122 (2012).

85. Liliana M. Garces, Understanding the Impact of Affirmative Action Bans in Different Fields of Studies, 50 AM. EDUC. RES. J. 251–284, 274 (2013).

documented similar declines in professional programs such as law[86] and medicine.[87]

In most states that have banned affirmative action in post-secondary education, the impact on minority enrollment rates at top public institutions is not only striking, but also immediate. For example, the University of California system was banned from using race conscious admissions beginning in 1998, and its three flagship campuses – the University of California, Berkeley; the University of California, Los Angeles; and the University of California, San Diego – quickly faced notable declines in minority enrollment.[88] Admission rates for black applicants at these three campuses dropped by more than half immediately following the ban, from 45%-55% in

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86. William C. Kidder, *Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000* 19 HARVARD BLACKLETTER LAW J., 1–42 (2003) (finding the affirmative action bans reduced enrollment in selective law schools 65.4% for black students and 37.3% for Hispanic students).

87. Liliana M. Garces and David Mickey-Pabello, *Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools*, 86 J. HIGHER EDUC. 264, 287 (2015) (finding that affirmative action bans reduced first-time minority enrollment in medical school from 18.5% to 15.3% (a 17.2% decline)).

88. David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUS. & LAB. REL. REV., 416, 420-21 (2005) [hereinafter Evidence from California and Texas]. In 2001, California adopted a "Top X Percent" rule, discussed infra Part C.

1995-1997 to 20-25% in 1998-2001.[89] Top public institutions in Texas similarly experienced declining minority enrollment soon after an affirmative action ban.[90] By one estimate, due to the ban, admissions rates for black and Hispanic applicants at the University of Texas at Austin fell 5-7% relative to the admission rates for white and Asian applicants between 1995 and 1997.[91]

While a few states (including Texas and California) have adopted Top X Percent plans in an effort to address declining minority representation, such programs are limited to in-state applicants. The vast majority of students attend undergraduate institutions close to home,[92] and a 2014 study suggests that a state-level affirmative action ban makes admission to selective institutions more difficult for minority applicants from neighboring states, particularly those applicants who reside in states without highly selective schools.[93] For example, a minority student

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89. *Id.*

90. In Texas, affirmative action was banned following the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

91. Evidence from California and Texas, *supra* note 88, at 422.

92. Becky Supiano, *Why Comparing Lots of Colleges Might Not Help as Many Students as You'd Think*, CHRON. HIGHER EDUC., (Dec 19, 2014), http://chronicle.com/article/Why-Comparing-Lots-of-Colleges/150937/ (noting that, in 2013, "fifty-four percent of freshmen attending four-year institutions in 2013 went to one no more than 100 miles from home" and "nearly 30 percent were 101 to 500 miles from home").

93. Grant H. Blume and Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to*

in Chicago has a better chance at gaining admission to a nearby top school (even with Michigan's affirmative action ban), than a minority student in Las Vegas, where the nearby selective institutions are all located in California, a state with a ban in place.[94] Thus minority students have varying levels of access to higher education based on whether neighboring states ban affirmative action.[95]

In addition to the negative impact on minority admission, enrollment and graduation rates, affirmative action bans also have a chilling effect on the number of minority students that even consider attending college.

Statewide Bans and Judicial Rulings, 36 EDUC. EVALUATION & POL'Y ANALYSIS 228-252, 244-45 (2014). This study defines a selective school as one with a median freshman SAT and ACT score at or above 1,100.

94. Grant H. Blume and Mark C. Long, *When Affirmative Action is Banned, Minority Applicants Have a Harder Time – Even in Neighboring States*, SCHOLARS STRATEGY NETWORK (2014), http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_blume_and_long_on_post-affirmative_action_admissions_effects.pdf. In addition to in-state options, the Chicago student can seek admission to selective institutions located in Indiana, Minnesota, and Wisconsin.

95. *Id.* An attempt to achieve uniformity in the form of a nationwide affirmative ban also limits access to higher education for underrepresented minority. A study modeled the impact of a nationwide affirmative action ban on minority representation in undergraduate programs; the results indicate that the share of black and Hispanic students at all four year colleges would decline by 2.0%, but that the share of underrepresented minorities at the most selective colleges would decline by 10.2%. Jessie Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. LAB. STAT., 113, 116 (2010).

One study found that the elimination of affirmative action in Texas led to a statistically significant decline in the numbers of Hispanic and black students taking college entrance exams.[96] The results continued to show a statistically significant decline, even accounting for the implementation of the Top Ten Percent Plan in Texas.[97]

Another study found that underrepresented minorities in California and Texas significantly lowered the number of SAT and ACT score reports they sent to in-state, public colleges following bans on affirmative action.[98] The study concludes that a student's probability of acceptance weighs heavily on the student's application decisions and that "minority applicants will substantially reduce the number of their score reports sent to top-tier colleges after the elimination of affirmative action policies."[99] Similarly, in Washington, the rates of admission of minority students to that state's top research schools decreased as a result of a drop in applications submitted by minority students.[100]

The lack of diversity at selective schools will negatively impact both minority and non-minority students who attend, as several studies show that the benefits to a diverse education extend to the entire student body.

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96. Lisa M. Dickson, *Does Ending Affirmative Action in College Admissions Lower the Percent of Minority Students Applying to College?* 25 ECON. EDUC. REV. 109, 114-16 (2006).

97. *Id.* at 116.

98. Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. ECONOMETRICS 319, 325 (2004).

99. *Id.* at 340.

100. *Id.*

Recent studies continue to provide evidence that diversity in a student body promotes learning outcomes, prepares students for an increasingly multicultural workplace (and world), improves leadership and teamwork skills and fosters civic engagement. These results hold true even for students who did not grow up in diverse settings. In her 1999 expert testimony for the University of Michigan, Professor Patricia Gurin noted that most of the students at University of Michigan hailed from schools and neighborhoods that are largely segregated.[101] Yet, her findings showed that, in higher education, a diverse student body can successfully broker the "patterns of racial segregation and separation historically rooted in our national life."[102] In particular, white students that attended colleges with at least 25% minority enrollment "were much more likely to have diverse friendships after leaving college and to live in diverse neighborhoods and work in settings where co-workers were diverse."[103] More recently, Professor Victor Saenz at the University of Texas showed in a 2010 paper that despite *de facto* segregation in many students' precollege environments, public universities that are more diverse can positively affect students' levels of interactions with diverse peers, which leads to academic benefits and helps to interrupt the "cycle of segregation." [104]

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101. Patricia Gurin, *Expert Report of Patricia Gurin: The Compelling Need for Diversity in Higher Education*, Gratz et al. v. Bollinger et al. *No. 97-75231 (E.D. Mich.)*, Grutter et al. v. Bollinger et al. *No. 97-75928 (E.D. Mich.)*, 5 MICH. J. RACE & L. 363, 366 (1999).

102. *Id.*

103. *Id.* at 386.

104. Victor B. Saenz, *Breaking the Segregation Cycle: Examining Students' Precollege Racial Environments and*

2. Eliminating Race-Conscious Decision Making Will Have Negative Consequences for the Nation

According to the most recent United States Census figures, by 2020, it is anticipated that more than half of the children born in the United States will be part of a racial or ethnic minority group.[105] That shift will occur for the nation as a whole by 2044, when non-Hispanic whites will become a minority.[106]

Given the nation's increasingly diverse and global society, not only is it important that the student body at top schools reflect the diversity found in the nation, but it is also critical that students at those top schools have meaningful contact with people from backgrounds different from their own. The path to leadership is often through top programs, and students at these elite schools will be chief among the political, business, military and community leaders of their generation. They must have cross-cultural awareness and be comfortable with different people, perspectives and places. However, as previously stated, due to longstanding racial and ethnic segregation in neighborhoods and secondary schools, the undergraduate setting is often the first opportunity that many of these future leaders will have to interact with those different from them before they enter the global workforce.[107]

College Diversity Experiences, 34 REV. HIGHER EDUC. 1, 30-32 (2010).

105. *Id.*

106. *Id.*

107. Gurin, *supra* note, 101; Saenz, *supra* note 104, at 5.

Limitations on race-conscious decision making would have the greatest impact on students at the most selective institutions, resulting in national leaders who will have had limited experience interacting with many of the nation's ethnic and racial groups. As stated above, an affirmative action ban would significantly reduce minority enrollment at the nation's most selective schools, displacing minority students, all of whom may not be able to be absorbed by other institutions.[108]

Importantly, the continued viability of race-conscious decision making is key to the nation's future. The elimination of race-conscious decision making would cause the country to suffer. A highly educated workforce is necessary to navigate the challenges of continued globalization. Against that backdrop, education for all is inferior if it does not offer students ample opportunity to engage with and learn from a wide variety of people, perspectives and beliefs.

Justice Powell recognized the benefit of diversity to society as a whole in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stressing that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 312-13 (quoting *Keyishian v. Bd. of Regents*, 305 U.S. 589 (1967)). Similarly, in *Grutter*, Justice O'Connor noted that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id. Grutter* at 330.

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108. Hinrichs, *supra* note 80; Backes, *supra* note 82.

The value proposition of diversity resonates even more today. Since *Bakke* and *Grutter* were decided, the world has continued to globalize, and the need for a diverse workforce is even more acute.[109] Employers continue to place a premium on candidates who can successfully interact with and relate to a wide variety of people, and college presents a unique opportunity to nurture this empathy and flexibility.[110] If American students come into contact with only those that are like them, they will be ill-equipped to navigate an ever-globalizing world. American businesses that depend on their employees' diverse perspectives will likewise suffer.

Studies have shown that groups with diverse members performed better than homogenous groups. Diverse groups show improved outcomes because of the varying viewpoints brought to the table. Beyond the introduction of alternative perspectives, the "majority" group members also behave differently in a heterogeneous group. Interestingly, studies have found that the better outcomes were driven by the mere presence of diverse members, and not necessarily because of new perspectives.[111] We

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109. *See* Scott E. Page, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007).

110. David Thomas, *Making Diversity Part of the Organization, in What do leaders need to understand about diversity?*, Q8: PUBLICATION YALE SCH. MGMT., Winter 2011, at 90, 92, ("[I]f our customer base is diverse, we need diversity in our workforce so that we can learn from our own diversity to make ourselves more effective at meeting the needs of our clients.").

111. A study simulated jury deliberations and found that "[w]hite jurors processed the trial information more systematically when they expected to deliberate with a heterogeneous group." Samuel R. Sommers, *On Racial Diversity and Group Decision*

will not reach our full potential as a nation if we resist heterogeneous groups.

3. Race-Conscious Decision Making Positively Impacts Today's Minority Students and Future Generation

Access to higher education has a positive impact on minorities' career success. One study found that undergraduate degree attainment and college quality increase both earnings and labor force participation, with evidence of larger increases for black and Hispanic workers relative to their white counterparts.[112]

For students who attend elite institutions, the career impact can be readily quantified. Students who graduate from the top-ranked public colleges earn at least 30% more than their counterparts who graduate from the bottom-ranked public colleges.[113] Black and Latino students,

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Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 607 (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940788 (click "Open PDF in Browser"). The author concluded the "present data suggest that racial heterogeneity can have observable decision-making benefits for groups as a whole and can also lead majority individuals to demonstrate improved performance." *Id.* at 608.

112. Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 ECON. EDUC. REV., 338 (2010).

113. Dominic J. Brewer, Eric R. Eide & Ronald G. Eherenberg, *Does it Pay to Attend an Elite Private College? Cross-Cohort Evidence on the Effects of College Type on Earnings*, 34 J. HUMAN RES. 104 (1999). Black and Hispanic students at selective colleges have higher retention and graduation rates

as well as students from disadvantaged backgrounds experienced an earnings increase from attending an elite institution.[114] In addition to earnings, minorities and disadvantaged students who attend elite institutions gain access to valuable networks and opportunities that ability alone could not have garnered them.[115] In many cases, mere attendance at an elite institution significantly factored into a student's career trajectory.[116]

This access to education transcends today's individual students. A number of studies have highlighted the correlation between education and poverty. Specifically, these studies show that education tends to break the cycle of poverty through increased employment opportunities and income. Hence, improving the quality of education and encouraging educational attainment has been noted as an important strategy for reducing poverty.[117]

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than those at less selective schools. Kalena E. Cortes, *Do bans on affirmative action hurt minority students? Evidence from the Texas Top 10% Plan*, 29 Econ. Educ. Rev. 1110 (2010).

114. Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q.J. Econ. 1491 (2002).

115. *Id.*

116. Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & Soc. Inquiry 395, 502-03 (2000).

117. Bruce Weber *et al.*, *Education's Effect on Poverty: The Role of Migration*, 29 Rev. Agric. Econ. 437, 437 (2007), http://naldc.nal.usda.gov/download/3970/PDF.

C. A COURT RULING THAT ENCOURAGES STATES TO ADOPT "TOP TEN PERCENT" LAWS IS DETRIMENTAL

Multiple studies demonstrate that "Top X Percent" laws have failed to generate increases in the enrollment of underrepresented minority students at public universities.[118] Florida's policy guarantees admission to the top 20% of Florida public high school students to a university within the Florida state university system.[119] California's policy for several years guaranteed admission to a California university to students who were either in the top 4% of their high school's graduating class or the top 12.5% of the state admissions index (based on GPA and SAT/ACT scores).[120] Unlike Texas, however, both Florida and California are "race neutral" states and cannot consider race as a factor in admission decisions. Generally, the result has been a reduction in the number of underrepresented minority students in the most selective schools. In California, the number of underrepresented minority students admitted to UC Berkeley dropped 58% between 1995 (the year that SP-1, implementing race

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118. Long, *supra* note 112, at 322-23; Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. LAB. ECON. 113 (2010).

119. FLA. ADMIN. CODE ANN. r. 6C-6.0029(c)(5) (2012).

120. California now guarantees admission to a California university if the student is either within the top 9% of her high school's graduating class or within the top 9% of the state admissions index. Regents of the Univ. of Cal., Minutes for the Regents of the University of California, attach. 8 at C(2) (Feb. 5, 2009), http://www.universityofcalifornia.edu/regents/minutes/2009/board2.pdf.

neutrality, was adopted) and 1998 (the class for which SP-1 first took effect).[121] At UCLA, the number of admitted underrepresented minority students dropped 53% during that same period.[122] Prior to Prop. 209, minority students were close to 30% of UC Berkeley and UCLA's admitted student population. After Prop. 209 was passed, they made up only 12% and 13% of each school's respective admitted pools.[123] In Florida, a study of enrollment data from 1994 to 2005 showed that the first class admitted to the University of Florida, without affirmative action showed significant losses for African-American students.[124] For Hispanic students, enrollment shares stayed fairly flat after the affirmative action ban and during the implementation of the Talented Twenty program, despite a broader increase in Hispanic enrollment at statewide institutions of higher education.[125] In short, "Top X Percent" laws only guarantee success in diversifying college entrant bodies if high schools are and remain largely segregated.

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121. Erica Perez, *Despite diversity efforts, UC minority enrollment down since Prop. 209*, CALIFORNIA WATCH, Feb. 24, 2012, http://californiawatch.org/dailyreport/despite-diversity-efforts-uc-minority-enrollment-down-prop-209-15031. So-called "race-neutral" admissions policies following state bans on affirmative action have generally been demonstrated to result in reduced minority admission at flagship public universities. *See* Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. HUM. RESOURCES 435, 447 (2012).

122. Perez, *supra* note 121.

123. *Id.*

124. *Id.* at 13-14.

125. *Id.*

"Top X Percent" laws also are inefficient because they incentivize strategic behavior that result in white students displacing minority students in the "Top X" pool. In Texas, researchers found that as many as 25% of students with motive and opportunity to increase their chances of being in the top 10% by moving to a different high school did so.[126] The net effect of this type of gamesmanship is that white students tend to displace minority students.[127] Thus, since the "Top X Percent" policies attract offsetting behavior that reduce their effectiveness in the long run, they are a poor policy option to rely on for achieving long-term diversity. As Justice Ginsburg explained in *Gratz*, percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003). Moreover, to escape offsetting strategic behavior, the "Top X Percent" laws would also require the restriction of student mobility. This in turn could also have the adverse effect of entrenching homogeneity and disincentivizing intellectual curiosity at the secondary school level.

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126. Julie Berry Cullen, Mark C. Long, and Randall Reback, *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 16663 2011), http://www.nber.org/papers/w16663.pdf.

127. *Id.* at 23.

D. THE FIFTH CIRCUIT SATISFIED THE STANDARDS SET BY THIS COURT

In *Fisher I*, this Court held that:

> [T]he Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Whether this record – and not 'simple . . . assurance of good intention,' – is sufficient is a question for the Court of Appeals in the first instance . . .. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve . . . the benefits of a student body diversity that 'encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'

Fisher I, 133 S. Ct. at 2421 (citations omitted). On remand, the Fifth Circuit reviewed the record in great detail and concluded that UT Austin's approach was narrowly tailored to achieve student body diversity and that "to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience in contradiction of the plain teachings in *Bakke* and *Grutter*." *Fisher II*, 758 F.3d at 659-60.

In sum, the Fifth Circuit plainly met the standard set by this Court and its decision should be affirmed.

CONCLUSION

For the reasons set forth above, colleges and universities should be permitted to make race-conscious admission decisions consistent with *Grutter*, and the judgment of the Court of Appeals for the Fifth Circuit in *Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), should be affirmed.

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